GOH SOON ANN

v.

SANDVIK (M) SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
GEORGE SEAH FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. OF 158 1981]
4 JANUARY 1984

CONTRACT: *Claim under s. 71, Contracts Act - Claim based on agency - Whether same person agent for both parties - Onus of proof - Inference of informed consent - Contracts Act 1950, s. 71*

EVIDENCE: *Admissibility of copy of letter - Evidence Act 1950, s. 73A(1), (3).*

The respondent was a wholeseller dealing in hardware products and the appellant was an old customer of the respondent. At the material time, the respondent had employed a salesman by the name of Tan Boon Soon. The respondent sued the appellant for RM140,036.11 for goods sold and delivered to Tan as agent for the appellant. Alternatively, it claimed under s. 71 of the Contracts Act 1950.

Held:

[1] The claim under s. 71 of the Contracts Act 1950, had not been made out. Four conditions must be satisfied to establish a claim under the above section and the respondent had completely failed to establish two of them.

[2] The copy of the letter written by Tan should not have been admitted, as provided by s. 73A(3) of the Evidence Act 1950.

[3] The respondent had failed to show that Tan was the agent of both the appellant and the respondent at the same time. The onus of proving that Tan had made the fullest disclosure and had obtained the informed consent of both the respondent and the appellant rested with the respondent and the respondent had plainly failed to discharge the burden. No inference of informed consent could validly be drawn without proof of knowledge by clear and cogent evidence. The mere fact of being agent for two or more parties who may have adverse interests is improper unless all principals have given their informed consent.

[Appeal allowed.]

Cases referred to:
Siow Wong Fatt v. Susur Rotan Mining Ltd. & Anor. [1963] 2 MLJ 118
Pole v. Leask [1863] 33 LJ Ch 155
Garnac Grain Co. Incorp. v. HMF Faure & Fairclough Ltd. [1968] AC 1130
Fullwood v. Harley [1926] 1 KB 498
Anglo-African Merchants Ltd. v. Bayley [1969] 2 WLR 686
North & South Trust Co. v. Berkeley [1971] 1 WLR 470
Linck, Moeller & Co. v Jameson & Co. [1885-86] 2 TLR 206

Legislation referred to:
Contracts Act 1950, s. 71
Evidence Act 1950, ss. 73A(1), (3)

Other source referred to:
Bowstead On Agency, 14th edn. pp. 142-143

For the appellant - Sri Ram; M/s. Sri Ram, Zulkifly & Kumar
For the respondent - T. Thomas; M/s. Skrine & Co.

JUDGMENT

George Seah FJ:

This is an appeal against a decision of N.H. Chan J and it raises questions of some commercial importance. At the outset, we like to observe that although notice of appeal was lodged on 15 August 1981 by the appellant no grounds of decision were supplied by the learned Judge. After waiting for more than one year learned Counsel for the appellant was compelled to file the memorandum of appeal without the benefit of a written judgment on 15 March 1983. As a result we have been handicapped in hearing this appeal inasmuch as we do not know on what basis the learned Judge decided the case in favour of the respondent. This is a very unsatisfactory state of affairs and we hope that such practice will not happen again. Before we consider the issues involved we will state briefly the relevant facts.

The respondent (plaintiff in the Court below) is a wholeseller dealing mainly in steel saws, tools and other hardware products and the appellant (defendant in the Court below) was one of the many customers of the respondent for a number of years. It was common ground that at the material times, the respondent employed a salesman by the name of Tan Boon Soon in the finished products department and he was the only salesman there. When the respondent first sued the appellant in the High Court the case against him was a simple and straightforward one based on a claim for goods sold and delivered at his request totalling RM164,467.62. The appellant admitted the sum of RM24,431.51 and disputed the balance amounting to RM140,036.11 which was made up of seven transactions as evidenced by invoices Nos. C2048, C1750, C1526, C1057, C1271, C2198 and C2947. After the carrier, Chong Chai Eng had testified that the appellant did not receive the goods referred to in the seven transactions but recalled that when his lorry brought the goods to the premises of the appellant, salesman Tan would be standing outside the shop to intercept them and directed him to transport them to another address at Ipoh Road, the respondent amended the statement of claim to read as follows:

(a) The plaintiff's claim against the defendant is for the recovery of RM140,036.11 for goods sold and delivered as evidenced by invoices Nos. C2048, C1950, C1526, C1057, C1271, C2198 and C2947 by the plaintiff to Tan Boon Soon as agent for the defendant.

(b) Further or alternatively, the plaintiff delivered the said goods to the said Tan Boon Soon as agent for the defendant not intending to do so gratuitously and the defendant enjoyed the benefit thereof. Accordingly, by virtue of s. 71 of the Contracts Act 1950 the defendant is liable to pay for the same.

In his amended defence the appellant denied that the said Tan Boon Soon was ever his agent and further contended that the claim under s. 71 of the Contracts Act 1950 was misconceived in law. However, after hearing the parties the learned Judge entered judgment in favour of the respondent as claimed. The claim of the respondent based on s. 71 of the Contracts Act 1950 can be disposed of shortly. Section 71 reads:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitiously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore the thing so done or delivered.

This section of the Contracts Act 1950 had been judicially considered by the Privy Council in the case of *Siow Wong Fatt v. Susur Rotan Mining Ltd. & Anor.* [1967] 2 MLJ 118. At page 120 Lord Upjohn in delivering the judgment said:

> That section is in terms identical with s. 70 of the Indian Contract Act upon which there is some authority to which their Lordships will later briefly refer.
>
> It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under s. 71. The doing of the act or the delivery of the thing referred to in the section:
>
> (1) must be lawful,
> (2) must be done for another;
> (3) must not be intended to be done gratuitiously,
> (4) must be such that the other person enjoys the benefit of the act or the delivery.
>
> In their Lordships' judgment these matters must be answered at the time that the act is done or the thing delivered and this, their Lordships think, is of fundamental importance...
>
> To bring the section into play the person when doing the act or delivering the thing must do the act "for another person" or deliver something "to him". So that his then present intention must be to do the act or to deliver the thing for or to another.
>
> It was argued before their Lordships as indeed in the Federal Court (as appears from the notes of Tan Ah Tah FJ) that doing the act means no more than that the act must be one which in fact benefits another. It was argued that the crucial point was that although you may do the act for your own benefit yet if in the end *ex post facto* you do not obtain that benefit but another does then you may claim against that other under s. 71 as an act done for him. This seems to their Lordships a complete misreading of the section. Their Lordships are fortified in their judgment by the observations of Lord Simonds in s. 70 of the Indian Contract Act in *Governor-General of India v. Madura* [1948] 75 I.A. 213 at page 221.

Applying the general principles to the facts of this case it was plain that the respondent had completely failed to establish conditions 2 and 4 respectively. We therefore ruled that the claim under s. 71 of the Contracts Act 1950 had not been made out.

In our judgment, only two questions need be considered in this appeal. First, was the learned Judge right in deciding that salesman Tan Boon Soon was an agent of the appellant in respect of these seven transactions referred to above? Secondly, does the evidence adduced at the trial show that the appellant and/or respondent consented to the creation of such a dual relationship?

Dealing with the first question it was submitted by learned Counsel for the respondent that on several occasions prior in time to these disputed transactions, the appellant had in fact paid for the goods sold and delivered even though they were received by salesman Tan and the delivery notes were not signed by the appellant (see pp.1 and 2 of the supplementary record of appeal). On the second question it was contended that at a meeting held on 11 January 1979 between the representatives of the respondent and salesman Tan on the one side and the appellant on the other, the appellant was alleged to have orally "confirmed that he allowed our salesman Tan Boon Soon to use the name of the company to place orders with the plaintiff on his behalf. He also confirmed that when he was paid by Tan Boon Soon he would then settle the bill with Sandvik. He would receive slightly more from Tan and that would represent his profit". On these uncontroverted facts it was argued that salesman Tan must be deemed to be an agent of the appellant when he accepted deliveries of the goods referred to in the seven transactions.

In answer to the first question learned Counsel had submitted that the appellant had only admitted on two occasions when he settled bills of the respondent without actually receiving the goods or acknowledging them on the delivery notes (see p. 69, 70, 71, 74, 76 and 77 of the record of appeal). On both these occasions the appellant alleged that salesman Tan reported to him that he had ordered goods from the respondent by making use of the appellant's firm name and had taken delivery of the goods without the knowledge or consent of the appellant. After ratifying these irregularities the appellant issued two separate invoices bearing the name of his firm recording the sales of the goods to Boon Trading Company, a business concern owned and operated by salesman Tan, at a profit. The appellant denied that he ever allowed salesman Tan to make use of the name of his firm to order goods from the respondent on his behalf. He further denied any knowledge of these seven disputed transactions. Questioned why he did not query the respondent about the monthly statement of accounts when he did not order or receive the goods mentioned therein the appellant replied that he did ask salesman Tan about them and the answer was that his office had made a mistake and that it had nothing to do with the appellant. The appellant said initially he accepted the explanation. But when the respondent continued to send the monthly statement of accounts containing the same disputed items the appellant became suspicious of salesman Tan and decided to write to the respondent on 15 December 1978 and the letter reads (see page 10 of the supplementary record of appeal):-

Hua Seong Hong
No. 553-1, 3½ Miles,
Ipoh Road,
Kuala Lumpur. 13-11.
15th December 1978

M/s Sandvik Malaysia Sdn. Bhd.,
6A, Jalan 223,
P.O. Box 213,
Petaling Jaya.

Dear Sir,

On checking through our accounts, we find that our balance do not agree with that shown in your monthly statements.

We would appreciate if you would kindly check through the following invoices, as we have not received the goods mentioned.

Date	Invoice No.	Amount
1.8.78	1057	RM26,119.12
15.8.78	1271	12,283.50
7.9.78	1226	20,180.14
13.10.78	1950	22,800.00
10.10.78	2048	25,450.30
18.10.78	2198	7,677.19
12.12.78	2947	25,525.88
		RM140,036.13

Your attention and early reply in this matter is most appreciated.

Yours faithfully,
Hua Seong Hong
Sgd:

There was, however, no response to this letter from the respondent.

At the meeting on 11 January 1979 it was argued by learned Counsel that the appellant denied owing to the respondent the sum of RM140,036.11 and at the same time, addressed a letter to the respondent in the following terms (see page 8.):

> Hua Seong Hong,
> No. 553-1, 3½ Miles,
> Ipoh Road,
> Kuala Lumpur.
> 11th January 1979
>
> The Manager
> Sandvik (M) Sdn. Bhd.
>
> Dear Sir,
>
> On 15 December 1978 our company furnished you with a copy of a Statement of Account, stating that our outstanding sum with your company is RM140,036.13. This amount was incurred by Mr. Tan Mun Soon who admitted that he had purchased goods from your company by using our name.
>
> Mr. Tan agreed to the above outstanding account and agreed to settle the whole amount of RM140,036.13 with Sandvik (M) Sdn. Bhd. This letter is specially written to inform your company of the above.
>
> Enclosed herewith is a copy of a letter from Tan Mun Soon admitting the above outstanding account.
>
> Yours faithfully,
>
> Sgd: Hua Seong Hong
>
> cc Tan Mun Soon

The appellant also attached thereto a copy of a letter written by salesman Tan. It is appropriate that we dispose of a short point here. Learned Counsel for the appellant submitted that a copy of the letter written by salesman Tan and marked as Exh. P3A should have been rejected on the ground that no evidence had been adduced by the respondent that it had made all reasonable efforts to find him without success. For the respondent it was argued that exhibit Exh. P3A was rightly admitted under s. 73A(1) since all the conditions therein stated had been satisfied. In our judgment, the contents of Exh. P3A appears to be caught by subsection 3 of the s. 73A thereof and as such ought not to have been admitted. Subsection 3 reads:

> Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish.

We now turn to consider the law. Some 120 years ago Lord Cranworth said in *Pole v. Leask*[1863] 33 LJ Ch 155 at 161:

> No one can become the agent of another person except by the will of that other person.

In *Garnac Grain Co. Incorp. v. H.M.F. Faure & Fairclough Ltd.* [1968] AC 1130 Lord Pearson said at page 1137:

> The law to be applied is the law relating to the creation of an agency relationship ... The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have

> professed to disclaim it, as in *ex parte Delhasse* [1878] 7 Ch D 511. But the consent must have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing, though likely to be less important. As to the conduct of the relationship, the question to be asked is: What is it that the supposed agent is alleged to have done on behalf of the supposed principal?

In that case, Lord Pearson was dealing with the law governing the ordinary relationship of principal and agent but here, we are concerned with an entirely different situation, viz, the position of a person who was alleged to have acted as an agent for both parties. According to the respondent, salesman Tan was its employee and/or agent and it was alleged that at the material times, he was also an agent of the appellant when he received the goods referred to in the seven transactions.

In *Fullwood v. Hurley* [1926] 1 KB 498 Lord Hanworth MR stated the general principle as follows at page 501:

> The plaintiff's position is quite clear, and made quite clear from the terms of what we have called the order to view, that is to say that he was at that time acting for the vendor; he was the agent for the vendor, owing a duty to his principal and intending to receive and being entitled to receive under the conditions a commission from the vendor. That being his position, he was in accordance with his duty disentitled so to engage in a secondary agency with the purchaser, agency which would conflict with his duty towards his original principal, the vendor, a position which, unless it was assented to with full knowledge by his original principal, could not be maintained by him as an agent at all...

At page 502 His Lordship continued:

> ... if and so long as the agent is the agent of one party, he cannot engage to become the agent of another principal without the leave of the first principal with whom he has originally established his agency.

On the same page Scrutton LJ said:

> No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal from a second principal, unless he makes the fullest disclosure to each principal of his interest, and obtains the consent of each principal to the double employment.

These two passages were cited by Megaw J in *Anglo-African Merchants Ltd. v. Bayley* [1969] 2 WLR 686 and by Donaldson J (as he then was) in *North & South Trust Co. v. Berkeley* [1971] 1 WLR 470.

In *Bowstead On Agency* (14th ed) at page 142/143 under the paragraph entitled "Agent acting for both parties" the principle is stated thus:

> ... he may not act for both parties to a transaction unless he ensures that he fully discloses all the material facts to both parties and obtains their informed consent to his so acting... Any custom to the contrary will not be upheld. It is not material that the agent is acting gratuitiously for one or both parties; the mere fact of being agent for two or more parties who may have adverse interest is improper unless all principals have given their informed consent ...

Applying the general principles herein stated to the facts of this case, in our judgment, the onus of proving that salesman Tan the agent had made the fullest disclosure and had obtained the informed consent of both the respondent and the appellant rested with the respondent. On the evidence adduced at the trial, the respondent had plainly failed to discharge this burden. On the contrary, the evidence showed that the respondent or its principal officer had no knowledge of the wrongdoings of salesman Tan until the end of November or early December 1978. The appellant denied any knowledge of these seven transactions and in our opinion, no inference of informed consent could validly be drawn without proof of knowledge by clear and cogent evidence. A *fortiori*, to draw such an inference against the appellant in business matters would be most dangerous *(Linck, Moeller & Co. v. Jameson & Co.* [1885-86] 2 TLR 206). The respondent's subsequent conduct in continuing to employ Tan was agent after coming to know of his wrongdoings and the futile attempts to make him pay up the monies due and which finally led to his dismissal do not, in our view, amount to such consent. On the contrary they clearly show that the respondent did not acknowledge Tan as agent for the appellant. It follows from these findings that the learned Judge was wrong in law to give judgment in favour of respondent. We therefore set aside the judgment and allow the appeal with costs here and below. The deposit of RM500 to be returned to the appellant.

Also found at [1984] 1 CLJ 73